

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 96-03665

NOV 27 1998

[REDACTED]
COUNSEL: None

[REDACTED]
HEARING DESIRED: No

APPLICANT REQUESTS THAT:

1. The Officer Selection Brief reviewed by the Calendar Year 1996A (CY96A) Majors board should be corrected to include his assignment to the [REDACTED] Operations Support Squadron (16 OSS) effective 15 January 1995 and reflect a Duty Air Force Specialty Code (DAFSC) of "K11S3Y" instead of "11S3Y."

2. The Officer Performance Report for the period 25 May 1988 through 24 May 1989, with attachments, be declared void and removed from his records.

3. He be directly promoted to the grade of major as if selected by the CY96A board. *[Applicant originally requested he be given consideration for promotion to major by Special Selection Board (SSB) for CY96A board, but then amended this request in his rebuttal.]*

APPLICANT CONTENDS THAT:

He made every effort to have his duty history corrected. Without the current data a fair assessment of his duty performance and career progression could not be made. The contested OPR is unfairly prejudicial to his career. His duty performance has always been outstanding no matter what personal or professional obstacles he was challenged with. He states "I do not want to be promoted because I have an alcohol disease." If his duty history reflected his actual career progression and the contested OPR were removed, his records would be able to be evaluated accurately without prejudice to his career.

Applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS:

The applicant was referred to Social Actions as a result of an on-base traffic-related accident in which alcohol was a factor. He was diagnosed as alcoholic by the mental health office at

[REDACTED] AFB and entered into the Substance Abuse Reorientation and Treatment (SART) in February 1989. He completed the program in November 1989.

In the interim, the contested OPR was referred to the applicant on 1 June 1989. The report indicated that he did not meet standards in the Section V Performance Factor of "Professional Qualities," and made reference to his "driving under the influence." The applicant acknowledged receipt but did not rebut.

The applicant was considered but not selected for promotion to the grade of major by the CY96A board, which convened on 4 March 1996. The most current DAFSC/duty history entry on that OSB was "5 Jan 96 - K11S3A/CF PLANS/MH53J INST AIRCRAFT CC, Special Operations Squadron." The next entry was "5 Jan 95 - 11S3Y/SPL MSN PLNR/MH53J INST ACFT CC, Operations Support Squadron." The Promotion Recommendation Form (PRF) reflected an overall recommendation of "Promote," and a DAFSC of K11S3A. The top OPR also reflected a DAFSC of K11S3A, and a duty title of "MH-53J Instructor Aircraft Commander/Special Mission Planner," 16 OSS, Hurlburt Field.

The applicant was also nonselected by the CY97C board, which convened on 16 June 1997. That OSB reflected the duty entry and DAFSC he is requesting. As a result of this second nonselection to major, he was separated from active duty. He is currently serving as a captain in the Air Force Reserves.

AIR FORCE EVALUATION:

The Chief, Reports & Queries Team, HQ AFPC/DPAIS1, indicates that the applicant's military personnel flight (MPF) had previously corrected the DAFSC. The author concurs that the DAFSC for applicant's 15 January 1995 duty entry should read "K11S3Y" instead of "11S3Y."

A complete copy of the Air Force evaluation is at Exhibit C.

The Chief, Appeals & SSB Branch, HQ AFPC/DPPPA, reviewed the appeal and indicates that the DAFSC for the 15 January 1995 duty history has been corrected to include the "K" prefix, which indicates the applicant is a qualified instructor pilot. The applicant petitioned HQ AFPC through appropriate channels prior to the CY96A board to have a duty title corrected on his OSB, which was accomplished. The Chief contends the applicant's request for SSB due to an incorrect duty history is not warranted. The duty title was corrected on his OSB prior to the CY96A board. The prefix "K" was added to his DAFSC afterwards. However, his 14 January 1995 OPR and the CY96A OSB stated his duty title was "MH-53J Instructor Aircraft Commander/Plans Officer." The promotion board was fully aware the applicant had been upgraded to instructor status. It would be presumptuous to

assume the promotion board members know the plain-text translation of every DAFSC, or the numerous prefixes and suffixes that can be attached to them. The Chief does not believe the applicant's promotion potential was affected by the omission and that SSB consideration on that basis is unwarranted. The omitted "K" prefix was a minor administrative error that in no way reduced the fairness of his promotion consideration. As to the contested OPR, why did the applicant wait more than seven years before filing this appeal? The applicant has proven only that he waited for promotion nonselection to motivate him to look for anything that may have negatively impacted his promotion potential, An evaluation report is not erroneous or unjust solely because it may have contributed to nonselection for promotion or may impact future promotion or career opportunities. The Chief concurs with the applicant that it is reasonable to assume the contested report negatively impacted his promotion potential. However, to effectively challenge an OPR, it is important to hear from all of its evaluators. The applicant provides no information from the evaluators. He states that the contested report should be removed due to the existence of "two sheets attached to [his] OPR. . . which were not included in his records at [the base level]." He does not mention that these sheets were the referral letter and his decision not to provide comments. Whether or not these documents are attached to the report at base level is completely inconsequential to this appeal; the Chief will ensure that they are. The report appears to have been referred for an appropriate reason and processed in direct accordance with Air Force policy. While the Chief applauds his completion of SART and consistent pursuit of sobriety, she believes it is far more likely he was nonselected as the result of the abundance of highly qualified helicopter pilots without "a driving under the influence incident," than due to an omitted "K" prefix. The Chief recommends denial.

A complete copy of the Air Force evaluation is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Applicant reviewed the evaluations and argues that AFPC has not provided any documents to support their position that [the DAFSC] error was harmless. As for the OPR, it is an unjust rating of his performance. If it was a "just" report, it would not have been a major factor in his nonselection, and AFPC concurs with that position. Had every officer who received a Driving Under the Influence (DUI) also received a referral report, he could make no claim of injustice. But that is not the case. He continues to be punished for actions that were atypical and isolated. In a supporting statement, the additional rater of the OPR asserts that he wanted to impress on the applicant the seriousness of not correcting a potential problem. The OPR had the desired effect, but he did not foresee the impact on the applicant's future. He

states that the applicant should not be further punished for his short-sightedness. He supports removing the report and giving the applicant SSB consideration.

The applicant also raises contentions concerning the promotion process. He argues, in part, that the selection boards are defective in that they fail to follow the law and **DOD Directives (DODD)** which establish the basic procedures each selection board must follow. The requirements of Title 10, **USC**, Sections **616** and **617**, are unequivocal. A selection board may not recommend an officer for promotion unless the officer received the recommendation of a majority of the members of the board. A majority of the members of the board "must certify" the officers recommended are best (and fully) qualified for promotion. Further, separate board reports are not issued in violation of **DODD 1320.12**. As the separate boards required by law and directive were not held, the protection envisioned by this **DODD** was denied him. Air Force selection boards give final recommendation authority to the board president---not the majority of the members of the board as required by law. This contravenes not only **DODD 1320.12**, but also Sections **616** and **617**. He requests direct promotion to major as if selected by the **CY96A** board because an SSB cannot provide a full measure of relief.

Applicant's complete response, and a volume of "Evidentiary Support" pertaining to the alleged illegal selection boards, is at Exhibit F.

ADDITIONAL AIR FORCE EVALUATIONS:

The Chief of Operations, Selection Board Secretariat, HQ **AFPC**, **DPPB**, reviewed this appeal and disagrees with the applicant's contentions. Air Force legal representatives have reviewed the procedures on several occasions during the past few years and have determined those procedures comply with applicable statutes and policy. The Air Force has used the panel concept for many years in conducting selection boards. The panel concept has safeguards to ensure an equal distribution of the equality spectrum of records to each panel. The author elaborates on these arguments and explains the order of merit (OOM) process.

A complete copy of the Air Force evaluation is at Exhibit G.

The Chief, Appeals & SSB Branch, HQ **AFPC/DPPPA**, examined the application and states that the additional rater's letter does not warrant removing the contested **OPR**. It is not uncommon for evaluators to write accurate, sometimes difficult, evaluations of officers and years later soften their position in reaction to subsequent performance and/or promotion consequences. For this reason, **OPRs** are considered most accurate at the time they are rendered. The other evaluators of this report are not heard from. Absolutely no evidence is provided that would suggest the contested **OPR** is in error or the product of injustice. The

applicant fails to recognize the seriousness of his misconduct. The consistence, or lack thereof, with which standards of conduct are enforced does not change the standard. Removal of the contested report would make the applicant's record inaccurate. The Chief's original recommendation to deny still stands.

A complete copy of the Air Force evaluation is at Exhibit H.

The Staff Judge Advocate, HQ AFPC/JA, agrees with AFPC/DPPPA's advisories and states that the rest of applicant's brief presents the now familiar arguments that the Air Force's promotion board procedures violate both statute and DODD. At the time the Defense Officer Personnel Management Act (DOPMA) was enacted, Congress was certainly aware of the existence of promotion board panels and expressed no problem with them. A majority of the board must recommend an officer for promotion and each member is required to certify that the corporate board has considered each record and that the board members, in their opinion, have recommended those officers who "are best qualified for promotion." Notwithstanding the opinion cited in Roane v. U.S., two other judges from the US Court of Federal Claims have held otherwise, determining that the Air Force's promotion system fully complies with the law (Small v. U.S., Neptune v. U.S.). The Air Force's competitive category "panels," which are convened concurrently as permitted by DODD 1320.12, fully accomplish its stated purpose; i.e., members of each competitive category compete with their respective "panel" only against other officers of that category. The nonline competitive panels are panels in name only; they, along with the line competitive category panels, are actually separate promotion boards for purposes of the statutes and DODD. Consequently, they fulfill all the requisite statute and regulatory requirements. The applicant has offered no proof that the board president of this or any Air Force selection board has ever acted contrary to law or regulation. As a result of the requirements levied by the 4 February 1992 version of the DODD 1320.12, the Air Force rewrote AFR 36-89 to comply with those requirements. This revised directive fully complies with the DODD. As for the SSB issue, the applicant has not provided a meritorious application warranting the need for any relief. As for the merits of these claims, the SSB procedure fully comports with the Title 10, USC, Section 628, requirement that an officer's "record be compared with a sampling of the records of those officers of the same competitive category who were recommended for promotion, and those officers who were not recommended for promotion by the board that should have considered him. The burden is on the applicant to prove otherwise and he has failed to do so. The BCMR has not in the past considered direct promotion except in the most extraordinary circumstances where SSB consideration was deemed totally unworkable. The applicant's case clearly does not fall into that category. The author suspects that the real reason the applicant was not selected was that his record was simply not strong

enough, not because of any error or injustice requiring action by the BCMR, but simply because his actual record of performance fell short of the requisite standard. The application should be denied.

A complete copy of the Air Force evaluation is at Exhibit I.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATIONS:

Applicant reviewed the additional Air Force evaluations and provided a 20-page counter-argument. He reiterates his previous contentions with respect to his OSB, the contested OPR, and the promotion board process. He asks again for direct promotion to major. He states that the Board is required to provide full and fitting relief and the SSB cannot provide full and fitting relief.

Applicant's complete rebuttal, with attachments, is at Exhibit K.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.
2. The application was timely filed.
3. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. We carefully and thoroughly reviewed the evidence of record, applicant's extensive submission, and the additional rater's supporting statement. Applicant's arguments regarding the contested OPR and OSB, as well as his numerous contentions concerning the statutory compliance of central selection boards, the legality of the SSB process, *inter alia*, were also duly noted. However, we do not find his assertions pertaining to the Air Force promotion and SSB processes in general, and the contested documents in particular, sufficiently persuasive to override the rationale provided by the Air Force offices of primary responsibility. We do not deny that the contested OPR may have had a negative impact on the applicant's promotion potential. However, this possibility, coupled with the additional rater's current regrets, do not make the report inaccurate or unfair as rendered. As for the OSB, while the DAFSC for the 15 January 1995 duty entry should have included the "K" prefix, we find its omission no more than a harmless error. The promotion board, which had access to the applicant's entire record, was aware that he had been upgraded to instructor status. We do not believe the missing "K" prefix adversely impacted his promotion potential or justifies SSB consideration. The applicant does not provide convincing evidence that the Air Force

promotion system is not in compliance with statute, nor does he demonstrate that, even if one were to accept his arguments as valid, there is a nexus between the alleged systematic errors and his nonselection. We therefore agree with the recommendations of the Air Force and adopt the rationale expressed as the basis for our decision that the applicant has failed to sustain his burden of having suffered either an error or an injustice warranting SSB consideration. Inasmuch as we have found no errors which denied the applicant full and fair consideration by the promotion board, we have no compelling basis for granting his request for direct promotion. We therefore conclude that this appeal should be denied in its entirety.

THE BOARD DETERMINES THAT:

The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.

The following members of the Board considered this application in Executive Session on 14 October 1998, under the provisions of AFI 36-2603 :

Mr. Thomas S. Markiewicz, Panel Chair
Mr. Charles E. Bennett, Member
Ms. Martha Maust, Member

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 13 Dec 96, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, HQ AFPC/DPAIS1, dated 23 Dec 96.
- Exhibit D. Letter, HQ AFPC/DPPPA, dated 17 Jan 97.
- Exhibit E. Letter, AFBCMR, dated 3 Feb 97.
- Exhibit F. Letter, Applicant, dated 1 May 97, w/atchs.
- Exhibit G. Letter, HQ AFPC/DPPB, dated 29 Jul 97.
- Exhibit H. Letter, HQ AFPC/DPPPA, dated 7 Aug 97.
- Exhibit I. Letter, HQ AFPC/JA, dated 4 Sep 97.
- Exhibit J. Letter, AFBCMR, dated 15 Sep 97.
- Exhibit K. Letter, Applicant, dated 24 Oct 97, w/atchs.


THOMAS S. MARKIEWICZ
Panel Chair